

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DIRECTV, INC., a)	
California corporation,)	
)	No. C03-4176 BZ
Plaintiff,)	
)	REPORT AND RECOMMENDATION
v.)	RE: PLAINTIFF'S MOTION FOR
)	DEFAULT JUDGMENT AGAINST
GRIGORY GROSMAN, et al.,)	DEFENDANT GROSMAN
)	
Defendants.)	
_____)	

Before me is plaintiff DIRECTV's motion for default judgment against defendant Grigory Grosman.¹ A hearing was held on February 2, 2005. Defendant did not file any opposition to plaintiff's motion, nor did he appear at the hearing. As defendant has not consented to the jurisdiction of a United States Magistrate Judge, this matter will be reassigned to a district judge with the following report and recommendation regarding default judgment.

On September 12, 2003, plaintiff filed this action

¹ All co-defendants have been dismissed.

1 against defendant and two other individuals alleging
2 violations of the Federal Communications Act of 1934, as
3 amended, 47 U.S.C. section 605, as well as the Electronic
4 Communications Privacy Act ("ECPA"), 18 U.S.C. sections
5 2510-2521. Plaintiff effected service of process against
6 defendant Grosman on November 28, 2003. After defendant
7 failed to respond to the complaint, and upon plaintiff's
8 request, the Clerk of this court entered his default under
9 Rule 55(a) on January 27, 2004. On February 26, 2004,
10 Chief Judge Patel issued an Order of Limited Assignment of
11 all DIRECTV cases pending in the Northern District to Judge
12 Ware. See February 26, 2004 Order. Pursuant to Chief
13 Judge Patel's Order, I issued a stay in all DIRECTV cases
14 assigned to me, which stay was lifted upon issuance of
15 Judge Ware's Order Regarding Limited Assignment to
16 Determine Issues Regarding Joinder of Defendants and
17 Showing Needed to Establish a *Prima Facie* Case Under
18 Statutory Claims. In re DIRECTV, Inc., No. C-02-5912-JW,
19 2004 WL 2645971 (N.D. Cal. July 26, 2004). Defendant
20 failed to appear at the August 30, 2004 status conference.
21 On November 10, 2004 plaintiff filed a motion for default
22 judgment against defendant.

23 Pursuant to Rule 55(b)(2), a court may enter default
24 judgment against a party when default has already been
25 entered by the Clerk. Fed. R. Civ. P. 55(b)(2). A court
26 may not enter a default judgment against an unrepresented
27 minor, an incompetent person, or a person in military
28 service. See Fed. R. Civ. P. 55(b)(2); 50 App. U.S.C. §

1 521. The defendant satisfies this requirement. See
2 Declaration of Kimberly R. Colombo in Support of Plaintiff
3 DIRECTV, Inc.'s Motion for Default Judgment Against
4 Defendant Grigory Grosman ¶ 8.

5 By his default, defendant is deemed to have admitted
6 the well-pleaded averments of the complaint except for
7 those regarding the amount of damages. Fed. R. Civ. P.
8 8(d); TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d 915,
9 917-18 (9th Cir. 1987).

10 Plaintiff seeks statutory damages against defendant
11 for violation of 18 U.S.C. section 2511(1)(a). Section
12 2511(1)(a) of the ECPA provides that "any person who
13 intentionally intercepts, endeavors to intercept, or
14 procures any other person to intercept or endeavor to
15 intercept, any wire, oral, or electronic communication . .
16 . " commits a federal offense. 18 U.S.C. § 2511. Section
17 2520(a) creates a private right of action for any person,
18 including a corporation, "whose wire, oral, or electronic
19 communication is intercepted." 18 U.S.C. §§ 2510(6),
20 2520(a). Ninth Circuit case law holds that satellite
21 transmissions are electronic communications protected under
22 the ECPA. U.S. v. Lande, 968 F.2d 907, 909 -10 (9th Cir.
23 1992) ("A person who views satellite television programming
24 by use of a modified descrambler and a satellite dish
25 'intentionally intercepts' the satellite television signal,
26 which is an 'electronic communication.'").

27 Having reviewed plaintiff's complaint, I find that the
28 allegations are sufficiently well-pled to establish

1 defendant's liability under section 2511(1)(a). Plaintiff
2 alleges that it is "the nation's leading direct broadcast
3 satellite system, delivering over 225 channels of
4 television and other programming to more than 10 million
5 homes and businesses in the United States." Compl., ¶ 1.
6 Defendant allegedly "purchased and used illegally modified
7 DIRECTV Access Cards and other devices ('Pirate Access
8 Devices') that are designed to permit viewing of DIRECTV's
9 television programming without authorization by or payment
10 to DIRECTV." Compl., ¶ 10. In addition, plaintiff claims
11 that defendant "intentionally intercepted, endeavored to
12 intercept, or procured other persons to intercept or
13 endeavor to intercept, DIRECTV's satellite transmission of
14 television programming, in violation of 18 U.S.C. §
15 2511(1)(a)." Compl., ¶ 25. Upon default these well-pled
16 allegations are deemed admitted.

17 The only issue that remains is the determination of
18 damages. Under section 2520(c)(2) the court may assess as
19 damages "the greater of (A) the sum of actual damages
20 suffered by the plaintiff . . . ; or (B) statutory damages
21 of whichever is the greater of \$100 a day for each day of
22 violation or \$10,000." 18 U.S.C. § 2520(c)(2). The court
23 has discretion under section 2520 to award damages as
24 authorized by the statute or to award no damages at all.
25 In re DIRECTV, Inc., 2004 WL 2645971 at *11; DIRECTV v.
26 Brown, 371 F.3d 814, 818 (11th Cir. 2004); Dorris v.
27 Absher, 179 F.3d 420, 429-30 (6th Cir. 1999) (citing
28 Reynolds v. Spears, 93 F.3d 428, 435 (8th Cir. 1996)).

1 However, the court may not award an amount falling between
2 those two choices. In re DIRECTV, Inc., 2004 WL 2645971 at
3 *16; DIRECTV v. Hedger, No. 03-CV-733, 2004 WL 1396274 at
4 *2 (W.D. Mich. Apr. 20, 2004).

5 Having alleged that defendant purchased two Pirate
6 Access Devices, plaintiff seeks \$20,000 in statutory
7 damages, \$10,000 per device.² I recommend awarding \$10,000
8 in statutory damages for a single violation of section
9 2520. See Smoot v. United Transp. Union, 246 F.3d 633, 646
10 (6th Cir. 2001) ("The \$10,000 liquidated damages amount
11 under § 2520(c)(2)(B) is designed to compensate a claimant
12 for all of the transgressor's misdeeds under the Act,
13 unless that transgressor has violated the Act on more than
14 one hundred separate days, in which case compensation is
15 \$100 for each such day."); DIRECTV, Inc. v. Bloniarz, 336
16 F. Supp. 2d 723, 727 (W.D. Mich. 2004) (rejecting DIRECTV's
17 "per-device" damage calculations). Section 2511
18 criminalizes intercepting or attempting to intercept any
19 wire, oral, or electronic communication. 18 U.S.C. §
20 2511(1)(a). Plaintiff has alleged only that defendant

21
22 ² In its motion for default judgment, plaintiff
23 suggests that it would be entitled to damages under section
24 2520 at \$100 for each day of the violation, were it to have
25 requested such damages. Plaintiff estimates that defendant
26 used the device for 1,425 days, and on this basis, contends
27 that it would be entitled to \$142,500.00. The duration of
28 violation alleged by plaintiff is based on the number of
days between the date that defendant purchased the devices
and the date that plaintiff developed a technique to
circumvent these devices. Plaintiff has not proven that
defendant intercepted the signal for 1,425 days. Therefore,
any award of damages on a *per diem* basis would be purely
speculative and not warranted under Federal Rule of Civil
Procedure 55.

1 possessed two devices, not that he committed multiple
2 violations of the statute.³ See Compl., ¶¶ 17, 25. At the
3 hearing, plaintiff also conceded that defendant likely used
4 the two devices in tandem, rather than to intercept
5 multiple signals.⁴ Having reviewed plaintiff's application
6 and supporting declarations, I recommend that plaintiff
7 recover statutory damages in the amount of \$10,000 against
8 defendant Grosman and post-judgment interest thereon
9 pursuant to 28 U.S.C. section 1961.

10 Plaintiff also seeks \$2,180.42 in attorneys' fees for
11 time expended on this case, under 47 U.S.C. section
12 605(e)(4) and 18 U.S.C. section 2520(b)(3).⁵ Attorneys'
13 fees and costs are recoverable under section 2520. 18
14 U.S.C. § 2520(b)(3). In support of its request, plaintiff
15

16 ³ Another section of the ECPA criminalizes
17 possession of such devices, under which Judge Ware found no
18 private right of action exists. See 18 U.S.C. § 2512
19 (criminalizing possession of any device that is primarily
20 useful for "the purpose of the surreptitious interception of
21 wire, oral, or electronic communications"); In re DIRECTV,
22 Inc., 2004 WL 2645971 at *8.

23 ⁴ At the hearing I granted plaintiff leave to submit
24 authority stating that use of two access devices in tandem
25 constitutes two separate violations of the ECPA. Plaintiff
26 submitted a supplemental memorandum citing no such
27 authority. Further, the description in plaintiff's
28 memorandum of the devices defendant possessed is consistent
with tandem use. I do not consider plaintiff's supplemental
memorandum and declaration to the extent that they concern
additional issues which I did not grant leave to address.

⁵ I do not consider plaintiff's request for fees
under 47 U.S.C. section 605(e)(4) because plaintiff has not
alleged a violation of this provision against defendant in
its complaint. Counsel conceded at the hearing that an
award under section 605(e)(4) would be inappropriate in this
instance. See Fed. R. Civ. P. 54(c).

1 submitted time records demonstrating that it reasonably
2 incurred \$1,475.42 in attorneys' fees for time expended in
3 this case prior to the hearing. Colombo Decl. ¶¶ 11-12,
4 Ex. E. The hourly rates charged by plaintiff's counsel are
5 reasonable. See Colombo Decl. ¶ 9, Ex. E. I recommend
6 plaintiff receive attorneys' fees for an additional 1.5
7 hours of work preparing for and attending the hearing,
8 which lasted approximately fifteen minutes. Based on
9 counsel's hourly rate, this amounts to an additional
10 \$352.50 in attorneys' fees. I therefore recommend that
11 plaintiff recover a total of \$1,827.92 in attorneys' fees.

12 For the foregoing reasons, I **RECOMMEND** that judgment
13 be entered in the amount of \$11,827.92 against defendant
14 Grosman pursuant to 18 U.S.C. section 2520 and that post-
15 judgment interest be awarded thereon, pursuant to 28 U.S.C.
16 section 1961.

17 Dated: February 25, 2005

18 /s/ Bernard Zimmerman

19 Bernard Zimmerman
20 United States Magistrate Judge
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